

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA.

Plaintiff,

V.

MAHAMOUD OMAR JAMA, et al..

Defendants.

CASE NO. CR06-255JLR
ORDER

1. INTRODUCTION

This matter comes before the court on Defendants' motion to dismiss the Indictment on due process grounds (Dkt. # 195). The court has considered the briefing, and for the reasons stated below, DENIES Defendants' motion.

II. BACKGROUND

The two-count Indictment, filed on July 20, 2006, charges 18 Defendants with violations of federal drug statutes in connection with a conspiracy to import and distribute Cathinone in its plant form, *catha edulis*, commonly known as khat (Dkt. #1). The khat plant is a shrub that is cultivated in Africa or Yemen. Cathinone, a Schedule I controlled substance, is apparently one of various stimulants present in the khat plant.

1 Count 1 of the Indictment, which incorporates the language of the Controlled
 2 Substances Act (“CSA”)¹, alleges that Defendants and others “unlawfully, intentionally,
 3 and knowingly did conspire to distribute Cathinone in the form of Catha Edulis, also
 4 known as khat, a substance controlled under Schedule I, Title 21, United States Code
 5 Section 812.” Count 2 includes an identical description of the controlled substance and
 6 charges that the Defendants knowingly and intentionally conspired to import the
 7 substance.

8 **III. ANALYSIS**

9 Defendants move to dismiss the Indictment, arguing that the CSA fails to provide
 10 the constitutionally required warning that khat containing cathinone is a controlled
 11 substance. As such, Defendants contend that the language of the CSA is void for
 12 vagueness in violation of the Fifth Amendment’s Due Process Clause. The Ninth Circuit
 13 has not considered such a challenge in the context of khat.

14 A penal statute is unconstitutionally vague if it fails to “define the criminal offense
 15 with sufficient definiteness that ordinary people can understand what conduct is
 16 prohibited and in a manner that does not encourage arbitrary and discriminatory
 17 enforcement.” Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citations omitted); see
 18 also United States v. Harriss, 347 U.S. 612, 617 (1954) (explaining that criminal statutes
 19 must describe an offense with sufficient definiteness to “give a person of ordinary
 20 intelligence fair notice that his contemplated conduct is forbidden”) (citations omitted).

21 The court is mindful that the classification of a federal statute as void for
 22 vagueness is a significant matter. The Supreme Court “has consistently favored that
 23 interpretation of legislation which supports its constitutionality.” Screws v. United States,
 24 325 U.S. 91, 98 (1945) (citations omitted).

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 27 ¹By CSA, the court refers to Title 21 of the U.S. Code, containing the federal drug statutes, and its
 28 enabling regulation, Title 21 of the Code of Federal Regulations, which specifically identifies and classifies
 proscribed controlled substances.

1 The challenged regulation forbids “any material, compound, mixture, or
2 preparation which contains any quantity of the following substances having a stimulant
3 effect, including its salts, isomers, and salts of isomers . . . [listing cathinone].” 21 C.F.R.
4 § 1308.11(f). Defendants concede that the CSA provides unambiguous notice that
5 cathinone is proscribed. They claim, however, that the CSA fails to provide fair warning
6 that possessing khat is illegal because neither the U.S. Code nor the Code of Federal
7 Regulations refers to the plant from which cathinone is derived, *catha edulis* or khat.
8 Along this vein, Defendants argue that, even had they read the regulation, its text would
9 not have given them, or any other person of ordinary intelligence, actual notice that khat
10 falls within the statutory proscription.

11 Defendants’ argument is based on their observation that the CSA’s normal
12 treatment of plants containing controlled substances is to list both the chemical substance
13 and the plant from which it is derived. See Defs.’ Mot. at 10 (citing examples, such as
14 the listing of the marijuana plant, the cocoa plant, and the opium poppy, together with
15 their respective chemical substances). In Defendants’ view, this pattern leads a person of
16 ordinary intelligence to believe that if Congress intended to criminalize the distribution of
17 khat in addition to cathinone, it would have listed the plant.

18 Defendants’ argument is unavailing. As observed by the First Circuit in
19 addressing an identical due process challenge regarding khat, “[t]he alleged pattern is, at
20 best, irregular.” United States v. Hussein, 351 F.3d 9, 16 (1st Cir. 2003) (observing that
21 Schedule I prohibits possession of psilocybin and psilocyn but not their plant hosts, magic
22 mushrooms). It stretches logic “to assume, on the basis of this limited pattern, that a
23 person of ordinary intelligence would jump to the conclusion that, despite the clear
24 prohibition on ‘material containing cathinone,’ khat containing cathinone is excluded
25 from coverage.” Id. The Eighth Circuit likewise considered this question and declined to
26 find the CSA void for vagueness due to its failure to explicitly identify khat as a plant
27 containing cathinone. See United States v. Sheikh, 367 F.3d 756, 764 (8th Cir. 2004)
28 (citing Hussein in concluding that due process does not require such a high degree of

1 specificity). In sum, that Congress “might, without difficulty, have chosen ‘clearer and
 2 more precise language’ equally capable of achieving the end which it sought does not
 3 mean that the statute which it in fact drafted is unconstitutionally vague.” United States
 4 v. Powell, 423 U.S. 87, 94 (1974) (quoting United States v. Petrillo, 332 U.S. 1, 7
 5 (1947)).

6 Most pivotally, any concern that a person of ordinary intelligence would not have
 7 fair notice that khat is a controlled substance is overcome by the fact that the government
 8 must ultimately prove that a defendant “knowingly and intentionally” distributed and/or
 9 imported a controlled substance. See 21 U.S.C. § 841(a)(1); 21 U.S.C. § 960(a)(1).² The
 10 Supreme Court has recognized that a “scienter requirement may mitigate a law’s
 11 vagueness, especially with respect to the adequacy of notice to the complainant that his
 12 conduct is proscribed.” Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455
 13 U.S. 489, 499 (1982) (internal citation omitted); Boyce Motor Lines, Inc. v. United
 14 States, 342 U.S. 337, 342 (1952) (“The statue punishes only those who knowingly violate
 15 the Regulation. This requirement of the presence of culpable intent as a necessary
 16 element of the offense does much to destroy any force in the argument that the
 17 application of the Regulation would be so unfair that it must be held invalid.”) (internal
 18 citation omitted); Screws, 325 U.S. at 102-03 (“[W]here the punishment imposed is only
 19 for an act knowingly done with the purpose of doing that which the statute prohibits, the
 20 accused cannot be said to suffer from lack of warning or knowledge that the act which he
 21 does is a violation of law.”).

22 The Sixth Circuit recently rejected an identical void for vagueness challenge in the
 23 context of khat containing cathinone. See United States v. Caseer, 399 F.3d 828, 839
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 26 ²That Defendants are charged only with conspiracy to commit the underlying offenses does not
 27 alter the requirement of scienter: “[c]onspiracy to commit a particular substantive offense cannot exist
 28 without at least the degree of criminal intent necessary for the substantive offense itself.” Ingram v. United
States, 360 U.S. 672, 677-78 (1959) (internal quotation omitted); see also Jefferson v. United States, 340
 F.2d 193, 197 (9th Cir. 1965).

1 (6th Cir. 2005). The court explicitly rested its holding on the fact that a conviction
2 involving cathinone demands proof of knowledge or intent: “[t]he requirement of specific
3 intent in this case mitigates any constitutional infirmity resulting from the vagueness of
4 the [CSA].” Id. While the Caseer court rejected the defendant’s due process challenge, it
5 ultimately reversed his conviction for conspiring to import cathinone. Id. at 844.
6 Notably, the court found that there was insufficient evidence of scienter to sustain a
7 conviction. Id. (observing that there was only “tenuous support for the conclusion that
8 defendant knew that he was participating in the importation of a controlled substance”).

9 The court concludes that the Indictment and the law that it incorporates fairly
10 inform Defendants of the charges against which they must defend themselves. The court
11 is further persuaded by the fact that, in order to sustain a conviction, the government will
12 have to prove that Defendants knew that they were importing or distributing a controlled
13 substance. To the extent that Defendants argue that they were unaware of a relationship
14 between their culturally accepted use of the khat plant and a proscribed controlled
15 substance, this is a factual argument that must await trial.

16 IV. CONCLUSION

17 For the foregoing reasons, the court DENIES Defendants’ motion to dismiss (Dkt.
18 # 195).

19 Dated this 2nd day of March, 2007.

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JAMES L. ROBART
United States District Judge